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No. 04-1123

IN THE

Supreme Court of the United States

LESLIE MORGAN, KENNETH STACKER, AND THEODORE BOLDIN, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT, PETITIONERS

v.

UNITED PARCEL SERVICE OF AMERICA, INC., AND UNITED PARCEL SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondent's Brief in Opposition to the Petition for *Writ of Certiorari*, hereinafter UPS's Response, seriously distorts facts and blatantly mis-cites law necessitating a reply by Petitioners.

United Parcel Service, hereinafter UPS, has for eleven years fought certification of the class of 500 black Center Managers. In its Response UPS refers multiple times both explicitly and implicitly to its contention that the class should not have been certified because of "decentralized" control. (*See* UPS's Response, pp. 1-3, 10, 14-15, 20, 22-23) The district court certified the class in part because of UPS's policy of vesting District Managers with "unfettered authority regarding promotions [resulting] in the discriminatory treatment of black salaried employees across the United States." (Cert. App. 73a) The district court specifically disagreed with UPS's argument that decentralized decisionmaking could defeat certification of a class. (Cert. App. 74a) The class was and remains certified and is entitled to have its claims heard and the controlling Supreme Court law applied. Plaintiffs have proved their claims, and nothing UPS says in its Response negates Plaintiffs' unrebutted proof.

UPS's Response blatantly misrepresents the facts of *Bazemore v. Friday*, 478 U.S. 385 (1986) to support the Eighth Circuit's refusal to apply *Bazemore's* clear holding that past pay cannot be a defense to present statistically significant disparate pay of black Center Managers. *Bazemore*, 478 U.S. at 395. *See also National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 111-112 (2002).

To allow the Court of Appeals' promotion opinion to stand is to offer a handbook for avoiding promotion of blacks to highest level management in companies which promote from within: a company may, says the Eighth Circuit, retard the multi-step advancement of its black employees and still be declared free from liability for not moving black employees as fast or far upward as similarly situated white employees. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 989 (1988). This Court should supervise the Eighth Circuit and declare invalid its formula for employers who promote from within to create and maintain discriminatory underrepresentation of black employees. S. Ct. Rule 10a.

I. *BAZEMORE* MANDATES REVERSAL OF THE EIGHTH CIRCUIT MAJORITY OPINION

UPS echoes the Eighth Circuit Panel Majority in claiming that its expert's finding a statistically significant pay disparity[1] in every year but 1995 should be disregarded because of the absence of sufficient performance data. That claim is without merit: in 1991 and 1992 UPS did not use performance to determine Center Manager salaries; in 1993 there was only one year of performance data to use and all of the experts

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[1]In UPS's Footnote 2 at p. 4 of its Response regarding base pay, UPS admits it misled the Court of Appeals to believe that "base pay" as used in this case was the manager's salary at promotion. In fact all of the experts referred to base pay as the manager's yearly salary without the stock award (MIP) or half month bonus. (*See e.g.* [Weiner] A503, 505, 513, 515; [Stapelton] 482, 490, 491, 492; [Evans] 570, 571; [Greenberg] S.A. 527, 537, 617)

used it; in 1994 there were two years of past performance data to use and all of the experts used it; in 1996 and 1997 UPS's expert, Dr. David Evans, had access to one and two years' more past performance ratings than he had for 1995. Presumably Dr. Evans ran all the regressions he intended to run and he found statistically significant disparity in each year except 1995. (Cert. Pet. pp. 9-11)

UPS's expert's finding regarding "discrimination" was, of course, improper: experts do not determine whether or not there is discrimination. Whether or not discrimination exists is the ultimate legal question--to be determined by a jury, or by a court only if no question of fact exists[2] or if no rebuttal is made to a plaintiff's *prima facie* case.[3]

In its Response UPS makes and repeats multiple times the blatantly false statement that "[b]oth sides' experts agreed there was no pay differential when past pay factors were considered." (UPS's Response p. 10. *See also* pp. 5, 14, 22) UPS's expert did not even mention "past pay" and Petitioners' expert was discussing the invalidity of UPS's expert's 1995 pay

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[2]as in the class pay case for the initial liability period of 1991-1994 and in 1996 and 1997, entitling the class to summary judgment

[3]as in the class pay case for 1995 and the class promotion case, entitling the class to summary judgment

regression.[4] UPS could have been trying to draw attention away from the fact that each regression which its own expert performed for 1991-1994, 1996 and 1997 found that UPS paid black Center Managers statistically significantly less than white Center Managers.

In its defense of the Panel Majority's creation of a non-existent "past pay" variable UPS argues that this Court in *Bazemore* rejected past pay as a variable "because the lower courts concluded that the defendant had discriminated in setting past pay." (UPS's Response pp. 12-13) This Court did not and could not have made that finding since the past pay discussed in *Bazemore* was **not** discriminatory as a matter of law: the "past pay" underpayment of blacks in *Bazemore* occurred prior to the applicability of the Act to the defendant. This Court did not say that past pay could be a variable. Rather, this Court found that the pay that was disparate but **not** unlawful in the past did not constitute a defense to current pay disparity. *Bazemore*, 478 U.S. 385 at 398-403. UPS's Footnote 5 on page 13 is very telling: the fact is that Plaintiffs did make a *prima facie* case of pay disparity and UPS did not make a defense. (Cert. Pet. pp. 8-12)

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[4]UPS, having accused Plaintiffs of relying "on a portion of [its] expert's report taken out of context" (UPS's Response p. 12) when Plaintiffs are referring to his regression for six of the seven years, entirely mis-cites that portion of Dr. Stapleton's deposition where he is describing the faulty methodology of Dr. Evans for 1995.

II. PLAINTIFFS' EVIDENCE OF PROMOTION DISCRIMINATION REMAINS UNREBUTTED

Unless the Petition for *Writ of Certiorari* is granted UPS remains free to fail or refuse to promote Center Managers to and above Division Manager in sufficient numbers to change the representation of blacks. Further, allowing the Eighth Circuit Opinion to stand is a clear invitation to other employers who promote from within to do the same.

Neither UPS, nor the district court, nor the Court of Appeals found any error in the calculation of standard deviations showing a gross disparity of blacks at the Division Manager level using four conservative internal UPS pools. UPS claims only that Plaintiffs used the "wrong workpool," stating "Plaintiffs have consistently refused to understand the limitations of the classes that were certified as to promotion . . . ." (UPS's Response p. 16) It is UPS and the lower courts who have confused class membership as defined by the district court at certification with Plaintiffs' substantive claims which the district court recognized at and subsequent to certification. (*See* Cert. Pet. pp. 20-22) Plaintiffs have consistently claimed that blacks do not move from *full-time Supervisor* **to** and **beyond** *Division Manager* as fast as whites, and do not move as far upward as whites. (A77-79) The district court certified those claims and Petitioners proved them. (*See* Cert. App. 59a-63a, 73a-74a, 81a-82a; Cert. Pet. 13-20) Then the district court suddenly and inexplicably stated when ruling on summary judgment that the class claim was a one-step promotion claim from Center Manager to Division Manager--a claim Plaintiffs never

made. (Cert. App. 45a) The Eighth Circuit ratified that travesty. (Cert. App. 12a-13a) UPS urges this Court to allow it and the lower courts to disregard Plaintiffs' unrebutted and remarkable proof of race discrimination up the UPS promotion ladder. (UPS's Response pp. 15-20; Cert Pet. pp. 13-20)

In support of its arguments UPS cites to cases that deal with special qualifications or licensing issues. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Mayor v. Educational Equality League*, 415 U.S. 605 (1974). (UPS's Response p. 19) None of those cases governs a plaintiff's work pool showing in a promotion-from-within case with totally subjective selection criteria where the crucial comparison is the racial composition of the top and bottom jobs.

Plaintiffs proved those claims and was entitled to have those claims determined based on the plain language of the class complaint pled by Petitioners and the class claims defined by the district court. *See Samuel v. Northern Telecom, Inc.*, 942 F.2d 834, 837 (2nd Cir. 1991); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986).

UPS argues that the Eighth Circuit's failure to follow its own promotion decisions in *Emanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990) and *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) is not one of the considerations listed in Supreme Court Rule 10. (UPS's Response p. 16) It is the Circuit's citing *Emanuel* and *Paxton* (Cert. App. 14a) as the law of the Eighth

Circuit[5] and then defying that law which cries for this Court to exercise supervision under Supreme Court Rule 10a on behalf of 500 black Center Managers.[6]

In a transparent effort to draw this Court's attention from the reality that UPS did not and could not rebut Plaintiffs' clear showing of promotion discrimination under the law of the Eighth Circuit and of this Court (Cert. Pet. 13-20), UPS claims "[b]oth sides' experts concluded that there was no discrimination in the promotion of Center Managers to Division Manager." (UPS's Response p. 6. *See also* pp. 16, 22)[7] However, shortly after UPS makes its outrageous mis-statement it refers to Dr. Weiner's cohort analysis (*Id.*) at p. 7), which stands unrebutted and shows it took blacks at UPS longer to reach upper level management than whites. (*See* Cert. Pet. p. 15)

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[5]The district court ignored *Paxton*, *Emanuel*, *Bazemore*, *Watson* and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[6]The district court had recognized those claims until days before trial was scheduled to begin, when UPS submitted a list of over 600 witnesses, some of whom were dead, and over 1,400 exhibits consisting of tens of thousands of pages. (A53, Dkt. Entry 416; A55, Dkt. Entry 441)

[7]UPS's only citation to Plaintiffs' expert's report (UPS's Response p. 17) is to one line of her rebuttal report in which she said the test she had done in her first report regarding the zero districts was done improperly and the test did not show the pattern she reported in her first report. The fact that "[b]oth courts below relied on" that statement (*Id.*) shows how improper those lower court decisions are: Plaintiffs did not offer that test as statistical proof of their claims.

UPS inaccurately asserts in its Response that the class has failed to introduce anecdotal evidence. (UPS's Response p. 22) UPS inadvertently, at pages 17 through 18 of its brief, in fact refers to powerful anecdotal evidence. The legally significant fact concerning UPS's total failure to promote blacks in 45 of some 60 districts is not how frequently Center Managers transfer out of their districts, but that District Managers who are responsible for promotion of blacks to Division Manager move from district to district. Of 28 District Managers who promoted employees to Division Manager level in their districts, 24 promoted no blacks. (App. 1283-1311) Those 24 District Managers were assigned by UPS to 53 different districts. (*Id.*) In those 53 districts subjective decisionmaking impacted adversely nationwide on the promotion of blacks in management at UPS: this fact supplements the unrebutted statistical evidence of nationwide discrimination under both Plaintiffs' disparate impact and disparate treatment models. (Cert. Pet. 13-20)

Contrary to UPS's Response at page 22, the class introduced copious additional nationwide anecdotal evidence:

- excerpts from transcripts of Class Certification Hearing (App. 166-205, 983-1043);

- evidence found by the district court at Class Certification (Cert. App. 74a), based on charts showing blacks did not move as fast from Supervisor to Center Manager

and from Supervisor to Division Manager. (App. 244, 254-257);

- affidavits of black management employees introduced at the Class Certification Hearing (App. 218-243, 156-165);

- Kent ("Oz") Nelson deposition, CEO during liability period--admission that blacks are underrepresented in upper level management (Cert. App. 110a-117a);

- excerpts from management deposition testimony (App. 1319-1803); and

- allegations in EEOC Charges (App. 816-953, 118-126).

In addition to the anecdotal evidence listed above, over 50 class members were prepared to testify at trial and UPS had deposed most of them. (Class Witness List, App. 54, Dkt entry 435. *See also* App. 1059-1160, containing summary of testimony)

III. NO COURT MAY WEIGH EVIDENCE AT SUMMARY JUDGMENT

UPS erroneously concludes in its Response that the lower courts did not weigh evidence. (UPS's Response pp. 21-23) UPS's conclusion is not supported by the lower courts' opinions. UPS did not respond to the fact that the Eighth Circuit Panel Majority stated a court ". . . can use the scale to a limited degree." (Cert. Pet. pp. 22-23) The purpose of using any scale is to weigh whatever is placed on the scale. The Eighth

Circuit said it placed evidence on a scale: the Eighth Circuit impermissibly weighed evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

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